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September 27, 1996

Mr. William F. Caton
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: CC Docket No. 94-54

Dear Mr. Caton:

Transmitted herewith for filing with the Commission, on behalf of Bell Atlantic NYNEX Mobile, Inc., are an original and eleven copies of its "Opposition to Petitions for Reconsideration" in connection with the Commission's First Report and Order in this proceeding.

Should there be any questions regarding this matter, please communicate with this office.

Very truly yours,

John T. Scott, III

John T. Scott, III

Enclosures

ORIGINAL

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Interconnection and Resale	)	CC Docket No. 94-54
Obligations Pertaining to	)	
Commercial Mobile Radio Services	)	

OPPOSITION TO PETITIONS FOR RECONSIDERATION

Bell Atlantic NYNEX Mobile, Inc., by its attorneys and pursuant to Section 1.429 of the Commission's Rules, hereby opposes certain petitions for reconsideration of the Commission's First Report and Order in this proceeding.[1]

SUMMARY

The First Report and Order repealed the Commission's rule requiring unrestricted resale of cellular service and replaced it with new Section 20.12, which requires each cellular, broadband PCS and "covered" SMR provider "to permit unrestricted resale of its service." The Commission also decided to "sunset" the rule five years after issuance of the last group of PCS licenses.

Several resellers (but notably not other carriers which have announced their plans to enter the CMRS market through resale) challenge the "sunset" provision.

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[1]First Report and Order, Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, FCC No. 96-262, released July 12, 1996. Federal Register notice of the petitions for reconsideration occurred September 12, 1996. This Opposition is therefore timely under Section 1.429(f).

Other petitioners offering SMR seek to exclude still more of their own operations from the new rule. Neither group of petitions presents any sound basis for the changes they request. The Commission should not shrink from its decision, grounded in the record, that the rule should be automatically terminated. If the sunset date is modified at all, it should be advanced. The Commission should also not cut back on the strides it has made to achieve Congress's mandate of regulatory symmetry among CMRS providers, by granting the demands of some SMR providers that additional SMR systems be exempted from the resale rule. These petitions for reconsideration should accordingly be denied

IF THE COMMISSION MAINTAINS THE RESALE RULE, IT SHOULD PRESERVE A SUNSET DATE.

The First Report and Order acknowledged that "[T]he resale rule, like all regulation, necessarily implicates costs, including administrative costs, which should not be imposed unless clearly warranted," and found that those costs were justified only until "competitive conditions continue to render application of the resale rule necessary." (¶ 14.) It thus decided to keep a resale rule but terminate it five years after the last initial PCS licenses are issued. (¶ 22.)

Petitioners challenge the Commission's decision to sunset the rule in five years from both directions. Some resellers, not surprisingly, argue that the rule should remain in place indefinitely.[2] Other parties argue that no resale rule is

[2]Petition for Reconsideration of the National Wireless Resellers Ass'n, Petition for Reconsideration of Connecticut Telephone and Communications Systems, Inc.

warranted at all, given rapid pro-competitive developments in the CMRS market.[3]

The Commission should reject out of hand the resellers' efforts to remove the sunset provision. The Commission's finding that the limited benefits of the rule do not apply once new competitors offer CMRS is amply supported by the rulemaking record, and the resellers present no reason to undermine it.[4]

First, the resellers' petitions are based on sweeping yet unsupported assertions about the CMRS market. They fail to supply specific facts, or any economic analysis, as to why the rule is essential to achieve competition. Instead, they fall into the pattern of arguing why a permanent rule would protect them. But as the Commission has repeatedly and properly held, its policies are designed to stimulate competition, not protect individual competitors.

Second, Connecticut Telephone sets up a straw man in alleging that the Commission found that "perfect competition" will exist in five years, then charging that there is no evidence for the Commission's finding. To the contrary, the Commission never said there would be "perfect" competition, only that there would be sufficient competition to allow removal of the rule. It determined that as more carriers entered the market, the benefits of a resale obligation diminish. This is the finding on which the Commission based the sunset, and the resellers fail to

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[3]Petition for Reconsideration and Clarification of the Personal Communications Industry Association, Petition for Reconsideration or Clarification of Nextel Communications, Inc.

[4]The National Wireless Resellers Association's Petition is mostly devoted to a recitation of the history of the landline and cellular resale rules. This recitation provides no basis for changing the First Report and Order's findings.

supply evidence that demonstrates that the finding is erroneous.

Third, Connecticut Telephone argues that a sunset date is inappropriate because until a market is "perfectly competitive," carriers possess market power that must be checked through regulation. This is incorrect and contrary to precedent. Markets need not exhibit perfect competition for competitors to lack market power. For example, the Commission has determined that, although the interstate interexchange telecommunications market is not fully competitive, AT&T lacks market power, and thus that certain restraints could be lifted.[5] The First Report and Order is consistent with the Commission policy that a rule should be removed when sufficient competition exists to obviate the need for it. There can be no question that this will exist five years in the future. The real question, as noted below, is whether the rapid increase in CMRS competition occurring today means the resale rule can be removed sooner.

Fourth, the National Wireless Resellers Association complains that the sunset provision was adopted abruptly without adequate notice or explanation. (Petition at 9-11.) This is incorrect. The Notice of Proposed Rulemaking in this

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[5]"[W]e conclude that, while the long-distance marketplace is not perfectly competitive, AT&T neither possesses nor can unilaterally exercise market power." Order, Motion of AT&T Corp. to be Reclassified as Non-Dominant Carrier, FCC 95-427, released October 23, 1995, at ¶ 35. As the Commission has recognized, "Almost all markets are imperfectly competitive, and such conditions can produce good results for consumers." Removing regulation, in short, need not await perfect competition, which is merely a "theoretical construct." Report and Order, Petition of the Connecticut DPUC to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut, FCC 95-199, released May 19, 1995, at ¶ 17.

docket (e.g., at ¶¶ 67-68) expressly noted requests that the rule be abolished entirely, and numerous parties commented on whether a rule was needed at all. Given that the resellers knew that repeal of the rule outright was at issue, they can hardly object to a decision that keeps the rule for five more years.

Fifth, the resellers' charge that a permanent rule is essential is belied by the announcements by MCI, Cincinnati Bell and other carriers that they have elected to offer CMRS on a resale basis and have already contracted to purchase large quantities of time from facilities-based providers.[6] None of these companies felt the need to object to the sunset.

In short, the Commission can quickly dismiss the resellers' objections to sunsetting the rule. The real issue for the Commission, as it reconsiders the First Report and Order, is whether the resale rule should be kept at all. PCIA and Nextel argue that the resale rule should be terminated now. Their petitions echo the comments of BANM and other parties which had recommended repealing the rule once the PCS licenses are issued because at that point the basis for the rule -- the duopoly cellular market structure -- will have disappeared.[7]

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[6]MCI has chosen resale as its principal strategy for offering CMRS. It acquired for $200 million Nationwide Cellular Service, the leading reseller, and purchased 10 billion minutes of air time from NextWave in 63 separate markets. Communications Daily, August 27, 1996, at 2.. Cincinnati Bell has also agreed to buy and resell several billion minutes from NextWave's PCS network. Communications Daily, August 9, 1996, at 6. NextWave itself has announced its intention to operate as a wholesale provider of service to resellers only. Communications Daily, September 20, 1996, at 2.

[7]PCIA Petition at 1-2, 4-11; Nextel Petition at 1-3. As Nextel correctly points out, the resale rule was explicitly premised on the cellular duopoly. When that

The sunset which the Commission chose is much more conservative, because it does not repeal the rule for five years after the last groups of PCS licenses are issued. Because the D, E and F block PCS auction is still in progress, those licenses will not be issued until 1997, meaning that the resale rule will be in place until 2002. There will be ample competition from PCS and SMR providers long before that date. Some A-block and B-block PCS providers are already offering service, many more will do so by the end of 1996, and the C-block licenses will soon be issued. SMR providers have already entered numerous markets.[8] Recent announcements by carriers entering the resale market demonstrate that the market itself will ensure that resale occurs where it is economically efficient to do so. Certainly by the end of 1997, the cellular duopoly will be relegated to history. So should the rule based on that duopoly.[9] While the Commission may well want to await completion of PCS licensing, the length of the sunset period is

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duopoly no longer exists, the premise for the rule disappears. For when the factual assumptions on which a rule is premised are no longer correct, the rule cannot be maintained. See Geller v. FCC, 610 F.2d 973, 980 (D.C. Cir. 1979); Meredith Corp. v. FCC, 809 F.2d 863, 873 (D.C. Cir. 1987).

[8]Nextel, for example, recently expanded its commercial wide-area SMR service, already available in several states, to Illinois, Indiana and Wisconsin. Communications Daily, September 17, 1996, at 5.

[9]As the Commission correctly notes, CMRS providers are still subject to fundamental obligations against unreasonable or unreasonably discriminatory practices. First Report and Order at ¶ 22. Given this obligation, it is not clear why a separate resale rule is needed. Whether or not the rule exists, an aggrieved reseller would have the same remedy -- a complaint to the Commission. (Although Connecticut Telephone alleges that the need to proceed by complaint would impose substantial costs on resellers, it fails to explain why those costs are also not present in pursuing a complaint under the resale rule.)

unnecessarily long. If the Commission decides to retain it, the sunset date should be advanced to the end of 1997.[10]

THE COMMISSION SHOULD NOT CARVE OUT A BROADER EXCEPTION TO THE RESALE RULE.

The American Mobile Telecommunications Association (AMTA), Nextel Communications, Inc. and the Personal Communications Industry Association (PCIA) complain that the CMRS resale rule should be modified to exempt more SMR providers. These parties, however, fail to offer any plausible legal basis to carve a broader exception for themselves or their members out of the resale rule. They merely reargue the points already advanced in comments in this proceeding that SMR providers should be exempted, and such reargument is not a proper basis for reconsideration.[11] BANM thus opposes their petitions on this point.

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[10]At a minimum, the Commission should specify the sunset as of a date certain. The current rule says merely that it will sunset "five years after the last group of initial licenses for broadband PCS systems" is issued. Section 20.12(b). The Commission's experience with the A, B and C-block PCS licenses shows, however, that licenses are issued in stages and that issuance may be deferred considerably if petitions to deny are filed. This will lead to uncertainty as to the precise sunset date. If the Commission keeps the five-year provision, it should specify the date as five years from the end of 1996, or December 31, 2001.

[11]"Petitions for reconsideration are not granted for the purpose of debating matters which have already been fully considered and subsequently settled. . . . In essence, the petition for reconsideration simply restates the objections to the DBS rulemaking that have been stated previously by petitioner and others. . . . That petitioner disagrees with one of [the Commission's] policy choices . . . is quite clear. However, bare disagreement, absent new facts and argument properly placed before the Commission, is insufficient grounds for reconsideration." Direct Broadcast Satellite Service, 53 RR2d 1637, 1641-42 (1983).

More fundamentally, petitioners seek to undo key policy decisions made by the Commission in CC Docket No. 93-252, the landmark proceeding implementing Section 332 of the Communications Act. Section 332 directed the Commission to regulate similar services on a consistent basis. In CC Docket No. 93-252, the Commission decided the same issue that AMTA, PCIA and Nextel want to relitigate now: Which services should be treated as similar and thus regulated consistently? In its Third Report and Order in that docket, the Commission adopted what it labeled a "broad" approach and included wide-area SMR within the group of services that should be subject to consistent CMRS regulation.[12] The Commission based its action on detailed factual findings as to present and future competition in the wireless industry. The Commission repeatedly pointed to record evidence showing that wide-area SMR providers which offered CMRS would be competitive with other CMRS providers and thus should be subject to the same rules.[13] This is the same group of SMR providers to which the Commission has applied the resale rule.

Petitioners fail to address why their requests for different and favorable treatment for certain SMR systems are not barred by the Third Report and Order. Their proposed changes to the resale rule are in fact inconsistent with prior

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[12]Implementation of Sections 3(n) and 332 of the Communications Act, Third Report and Order, CC Docket No. 93-262, 9 FCC Rcd 7988 (1994).

[13]Id. at 8027-8036. For example, the Commission found, "[T]here is general agreement that wide-are SMR service is developing as a competitor to the cellular industry," and that "wide-area SMR operators are in competition with cellular carriers." Id. at 8029.

Commission decisions finding that wide-area SMR should be regulated consistently with PCS and cellular, and would contradict Congress' mandate of regulatory parity.

Moreover, the ways that these parties seek to be defined out of the resale rule are unacceptable. AMTA and Nextel argue that only SMR providers using a "mobile telephone switching facility" should be covered, a standard that would rewrite the Commission's determination in CC Docket No. 93-252 as to what constitutes CMRS.[14] PCIA argues for a "small carrier" exemption (although it does not identify what the "cut-off" would be). Again, however, this issue has already been raised in proceedings implementing Section 332. The Commission properly did not exempt "small" carriers, however defined. Mere size does not determine whether a carrier offers competitive services. Were that the case, a "small" cellular or PCS carrier could claim an exception, effectively gutting the Commission's symmetrical regulatory scheme for CMRS.[15]

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[14]See Implementation of Sections 3(n) and 332 of the Communications Act, Second Report and Order, 9 FCC Rcd 1411 (1994).

[15]In a Petition for Reconsideration or Clarification, Small Business in Telecommunications, Inc. asks that the Commission clarify the scope of the term "covered SMR" so that it reaches only incumbent wide area and 800/900 MHz SMR licensees holding geographic licenses. This is consistent with the discussion in the First Report and Order and the new resale rule. In contrast, the new exceptions proposed by AMTA, Nextel and PCIA, because they go well beyond the rule and exclude some operations of wide-area SMR licensees, should be rejected.

CONCLUSION

For the reasons set forth above, the Commission should deny the petitions for reconsideration which seek to preserve the CMRS resale rule indefinitely. If the resale rule is maintained, the sunset date should be advanced. The Commission should also deny the petitions which request that additional SMR providers be exempted from the rule.

Respectfully submitted,

BELL ATLANTIC NYNEX MOBILE, INC.

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Dated: September 27, 1996

CERTIFICATE OF SERVICE

I hereby certify that I have this 27th day of September, 1996, caused copies of the foregoing "Opposition to Petitions for Reconsideration" to be sent by hand delivery or by first-class mail, postage prepaid, to the following:

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